

Order

Michigan Supreme Court
Lansing, Michigan

August 11, 2010

Marilyn Kelly,
Chief Justice

ADM File No. 2010-18

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed Amendment of
Rule 6.1 of the Michigan Rules
of Professional Conduct

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 6.1 of the Michigan Rules of Professional Conduct. Before determining whether either of the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either of the proposals in its present form.

[Additions are indicated by underline, and deletions by strikethrough.]

ALTERNATIVE A
(Supreme Court proposal)

Rule 6.1 Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means, or to public service or charitable groups or organizations. A lawyer may also discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The responsibilities set forth above are voluntary and shall not be enforced through disciplinary process or any other means.

Comment: The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This rule expresses that policy, but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

ALTERNATIVE B

**(State Bar of Michigan Representative Assembly proposal,
as revised by the Supreme Court)**

Rule 6.1 Voluntary Pro Bono Publico Service

~~A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means, or to public service or charitable groups or organizations. A lawyer may also discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.~~

~~Comment: The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization~~

~~representation and the administration of justice. This rule expresses that policy, but is not intended to be enforced through disciplinary process.~~

~~The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well to do.~~

~~The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.~~

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 30 hours or 3 cases of pro bono legal services per year, and/or to make a financial contribution to a legal services agency that provides free legal services to the poor or to traditionally underrepresented groups each year. The recommended minimum contribution level is \$300 per attorney per year for all attorneys and \$500 per year for those lawyers whose income allows a higher contribution. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the 30 hours (or 3 cases) of legal services without fee or expectation of fee to:
 - (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
 - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil

rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

- (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession.

In addition to providing pro bono services, a lawyer should voluntarily contribute financial support to organizations that provide free legal services to persons of limited means.

The responsibilities set forth above are voluntary and shall not be enforced through disciplinary process or any other means.

Comment:

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as postconviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and

food pantries that serve those of limited means. The term “governmental organizations” includes, but is not limited to, public protection programs and governmental offices or agencies that provide direct services to persons of limited means.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraph (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys’ fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer’s usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be a minimum of \$300 per lawyer, per year or \$500 for those lawyers whose income allows. While law practice economies vary throughout Michigan, nonetheless, there are a considerable number of lawyers in large law firms or other successful practices for whom an annual contribution greater than \$300 is warranted. A donation can be made to the Access to Justice (ATJ) Fund administered by the Michigan State Bar Foundation. In addition, it is acceptable for firms to satisfy the pro bono responsibility collectively, as by a firm's aggregate donations or pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Where possible every lawyer should financially support such programs in addition to providing direct pro bono services whenever such service is feasible. The ATJ Fund raises funds for the provision of legal services to the poor in all areas of the state. The ATJ Fund also supports the work of a number of statewide, regional, and local legal services programs. This rule recognizes a financial donation to the ATJ Fund as one method of satisfying a lawyer's pro bono responsibilities. The State Bar of Michigan and the Michigan State Bar Foundation will annually publish a list of programs eligible to receive attorney financial pro bono donations.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this rule.

Staff Comment: Alternative A is the current version of MRPC 6.1 with the addition of proposed language that would clarify that lawyers would not be subject to disciplinary action or any other process to enforce their responsibility to provide pro bono services. Alternative B, modified slightly by the Court for publication, was submitted by the State Bar of Michigan's Representative Assembly, and is based largely on the American Bar Association's Model Rule of Professional Conduct 6.1. The proposed amendments would clarify that each lawyer has a responsibility to provide pro bono legal services, and would establish in the Michigan Rules of Professional Conduct an aspirational goal for a lawyer to donate 30 hours or handle 3 cases per year, and/or make a financial donation of \$300 or \$500 per year. The requirements are similar to the existing standard adopted by the SBM's representative assembly in 1990, which recommends Michigan lawyers provide civil legal services to three clients, provide 30 hours of service, or contribute \$300 to programs providing civil legal services to the poor. The proposal would create a professional responsibility for lawyers that would require them to provide legal services to those of limited means, but would state in the rule that

the responsibility to do so is voluntary and not intended to be enforced through a disciplinary process or by any other means.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by December 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-18. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

YOUNG, J. The proposed amendment of MRPC 6.1 is unnecessary. The current rule properly encourages public service as an aspirational goal for all members of the profession. Moreover, I would eliminate the current Staff Comment that focuses unnecessarily on ABA “policy” goals, in favor of a general statement that broadly encourages lawyers to provide pro bono legal services to their communities as an integral component of the concept of “professionalism.”

One of the more disturbing aspects of the state bar proposal (Alternative B) is its enumeration of particular categories of groups that it considers worthy of attorneys’ support. To the extent that the state bar exhorts its members to contribute specific amounts of time and/or money to particular causes, its proposal runs the risk of politicizing the concept of pro bono service and enshrining such politicization into the Rules of Professional Conduct. Justice Markman aptly notes alternative charitable groups worthy of lawyers’ time and contributions. It is unnecessary—and potentially divisive—to enshrine into the Rules of Professional Conduct specific types of groups “worthy” of pro bono service and financial support, at the expense of other groups no less worthy. There are better ways of encouraging pro bono service than Alternative B.

Indeed, I question the need to encourage pro bono service beyond the provision that already exists in our Rules of Professional Conduct. There are many avenues for the bench and bar to encourage members of the profession to engage in *voluntary* service than in prolix and controversial amendments to the Rules of Professional Conduct.

The fact that members of this Court felt obligated to add a disclaimer to the state bar proposal to make clear that the rule remains only aspirational is a clue that the rule seems overly prescriptive as well as conscriptive. I support retaining the present aspirational language as it stands.

CORRIGAN, J., concurs with YOUNG, J.

MARKMAN, J. I oppose the State Bar of Michigan's pro bono proposal (Alternative B) because it would: (a) narrow the definition of pro bono public service; (b) render this concept increasingly ideological and political; and (c) thus undermine the consensus that has always existed on this Court, and within the legal profession, in support of pro bono public service. There is no reason why this Court should be divided, as it now is, over the encouragement of pro bono public service within our rules of professional conduct.

Rule 6.1 of the Michigan Rules of Professional Conduct currently provides:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means, or to public service or charitable groups or organizations. A lawyer may also discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The state bar now recommends modifying this rule to provide that "every lawyer" has a responsibility to provide pro bono services to "persons of limited means;" and that a "substantial majority" of a lawyer's pro bono service must go to "persons of limited means" or to charitable, religious, civic, community, governmental, and educational organizations that are "designed primarily to address the needs of persons of limited means." Additional pro bono services may be provided to "groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations," but only where such services are "in furtherance of their organizational purposes" and "where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate." Comments to the state bar proposal further specify that work on "First Amendment claims, Title VII claims and environmental protection claims," and "death penalty appeal" cases, would satisfy the new rule.

Thus, the state bar's proposed rule and comments single out for special attention *certain* classes of organizations, it makes explicit reference only to *certain* pro bono activities, and it refocuses the concept of pro bono public service to encompass principally *certain* categories of beneficiaries. If, for example, this Court is going to specifically identify as qualifying pro bono service, lawyer efforts on "death penalty appeals," and in support of "civil liberties" causes, then we should also specifically identify as qualifying pro bono service, lawyer efforts on behalf of victim's rights causes, veteran's organizations, and police benevolent groups. If we are going to specifically identify as qualifying pro bono service, lawyer efforts on behalf of "public rights" groups and "civil rights" organizations, then we should also specifically identify as qualifying pro bono service, lawyer efforts on behalf of "scouting groups," "service clubs," "hospices," and

“rescue missions.” If we are going to define as qualifying pro bono service, lawyer efforts on behalf of “First Amendment claims,” “civil rights laws,” and “environmental protection,” then we should also specifically define as qualifying pro bono service, lawyer efforts on behalf of “Second Amendment claims,” “property rights laws,” “religious liberty,” “election fraud,” and the scope of the “Commerce Clause.” And if we are going to explicitly and repetitively focus upon lawyer efforts on behalf of “persons of limited means” as qualifying pro bono service, then we should also explicitly and repetitively focus upon lawyer efforts on behalf of “persons who are handicapped,” “persons who are elderly or infirm,” “persons who are mentally impaired,” “persons who are the victims of child and domestic abuse,” and “persons who suffer from diseases and disasters.” Lawyer efforts on behalf of each of these additional forms of public service fairly qualify as pro bono service, and should not be relegated to a lesser position in the rules of professional conduct.

It is not so much what is *included* in the state bar’s proposal that is objectionable, as it is what is *not* included. It is not so much what is *singled out* in their proposal that is objectionable, as it is the fact that *no* cause should be singled out. In a free society, in which most charitable works are carried out by nongovernmental organizations, in which there is a vital private sector that helps to sustain the needs of neighborhoods and communities, and in which millions of men and women gather each week at meetings of the Rotary Club, the Optimists, the Lion’s Club, the Elks, the Kiwanis Club, the American Legion, the Knights of Columbus, and countless other organizations that perform good works, I strongly oppose the idea of singling out just a few of these that might be preferred by the leadership of the state bar. This misguided attempt at a specific definition altogether fails to reflect the full range, and the genuine diversity, of the charitable and public service interests of the nearly 40,000 lawyers of this state.

I am also uncertain as to what the state bar intends by its new language redefining qualifying pro bono service to encompass lawyer efforts on behalf of “governmental organizations” and “public rights.” If by this language, the state bar intends to make clear that legal aid organizations fall within their new rule, that is one thing, although such activities are already well covered under the present rule. If, on the other hand, the state bar intends that any lawyer efforts on behalf of any governmental agency constitutes qualifying pro bono service, then I am concerned that the concept of charitable and pro bono service may be in the process of subtle redefinition. Is lobbying a qualifying pro bono service where it is conducted on behalf of “public rights” asserted in proposed federal or state bills? Is assisting a public agency to carry out regulatory, investigative, or enforcement functions invariably a pro bono service? Is there anything at all carried out by any government agency that does not involve “public rights,” or that does not constitute qualifying pro bono service? Is a lawyer who assists the EPA in identifying endangered species on private property upholding a “public interest,” and thereby performing pro bono service, whereas a lawyer who assists the property owner in

defending his land-use rights serving merely a “private interest,” and thereby not performing pro bono service?

There is no need to transform the focus of Michigan’s pro bono rules in the manner proposed by Alternative B, and the state bar has offered no justification for its proposal. There is no need to alter the current rule that recognizes, and respects, that pro bono service on behalf of terminally-ill children, Alzheimer sufferers, drug education, AIDS prevention, alcohol rehabilitation and MADD, culture and the arts, tree planting, literacy assistance, 4-H clubs, nature centers, runaway teenagers, orphans and foster children, the blind and the deaf, animal rights, neighborhood watch activities, mental health, pregnancy services and abstinence counseling, religious charities, the Special Olympics and Habitat for Humanity-- to name a few-- can be just as critical to the well-being of a community as the specific pro bono activities now elevated in the state bar’s proposal to first-among-equals status. The state bar’s proposal is unfortunate and shortsighted in creating controversy and divisiveness in a realm in which there should be none, and in which thus far there has been none.

I strongly support Alternative A, which reflects the status quo in this state concerning pro bono public service on the part of the bar, and which would maintain the consensus in support of such service that currently exists on this Court and within the profession. For the reasons stated, I equally strongly oppose Alternative B.

CORRIGAN, AND YOUNG, J.J., concur with MARKMAN, J.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 11, 2010

Corbin R. Davis

Clerk